

THE MEANING OF FREEDOM OF THE PRESS

A philosophical approach

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The fundamental right to the freedom of the press has frequently been relied upon, not only by legal professionals, but also in discourses involving any public figure. Defenders of the freedom of the press tend to construe this right as a set of obligations for the government (regulation) to stay away from certain matters. I shall present arguments in the following parts to support another interpretation, under which freedom of the press is a more complex right covering various important values, in addition to the undisturbed operation of journalists, editors, and media outlets. In the following section, I discuss the philosophical foundations of this fundamental right, hence references to specific legal or constitutional provisions will be rare.

1. Discussion of the Fundamental Questions

The first advocates of freedom of speech, because of the nature of the social order at the time when the need for freedom was first articulated, primarily preached the need for independence from the State. The struggle for freedom of the press and speech is a constant “concomitant phenomenon” of the drastic societal changes that can be viewed as prerequisites for today’s democratic order. The publicity created by the press, although sometimes revolutionarily rapid and therefore short-lived; sometimes slower and therefore more lasting, is the engine of these changes. However, the need for free speech and a free press never crystallised into a thesis as objectives in themselves: they were instruments necessary to reform society, realise a more just political system and, later, to involve the majority of the public in democratic decision-making.

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However, in freedom of speech, individual liberty also receives great emphasis. Each person is entitled to the right to fulfil his individuality not only against the State but also against the community. Sometimes there is tension between the individualistic and community-based theories of freedom and, in practice, there is a need to strike a balance between individual rights and community interest.

After the two genocidal dictatorships of the 20th century, and as a result of them, the process, during which original, society-level objectives are sidelined and replaced by the recognition of individual rights above all, gained new momentum. According to certain views, the danger of the breach of these rights can only be expected from the State. However, other positions argue the necessity of the restriction of private sphere, which uses its “private censorship” more effectively than the State, because it overshadows freedom of speech, especially the societal function of the media resulting from the order of the objective of profit production overriding everything. In the centre of the debate between the two opposing views lies the question of whether freedom of speech is a “multidimensional” right, in other words, whether, beyond its *negative* nature, according to which the State is obliged to respect the right and avoid interference with its practice, is there a *positive* nature, which obliges the State to perform certain proactive actions to further the opportunities for practicing the right? What is freedom of speech? What is its content?

Freedom of speech means that any person may express his or her opinions, may communicate facts, and may convey information originating from others freely. The actual contents of this right could be defined by analysing its limitations. However, such limitations – due to the outstanding importance of this right – may not be extensive; limitations must be justified by the protection of other fundamental rights or material interests, and must be proportionate to the aim to be achieved. Due to the negative nature of the freedom of speech, no regulation may interfere with the exercise of this right beyond the approved limitations. According to the view of those exclusively advocating its negative nature, the role of the State ends after declaring the basic right and ensuring that it does not interfere *itself* with the practice or the right. Proponents of the negative nature believe that the State must retreat from the territory of this fundamental right, must recognise and respect it, but should neither participate actively in facilitating and enabling the practice of the right, nor in assisting in the resolution of disputes arising between citizens in the practice of the right.

Obviously, the negative nature in itself is insufficient to define the content of the right. To a certain extent, the State does have an obligation to make the practice of the right possible. The State must facilitate, for example, the organisation of public demonstrations, guarantee their safety and security, and ensure that demonstrators do not disrupt each other's events. The State has to organise the regulation of the media so that, during elections, political organisations and candidates have access to the media; it has to run and finance public media, and has to provide financial support to the arts and literature.

For the first time, Benjamin Constant differentiated between the liberty of “ancient” and “modern” times: the freedom of the Athenian citizen was only political in nature. He could freely participate in public affairs, could take part in decision-

making, but his private sphere was strictly regulated. On the other hand, the modern, 19th century citizen jealously protects his privacy, which is also guaranteed by the State. However, his political freedom is only apparent.²

Differentiation between the “two principles” of freedom, which could be interpreted as the further development of Constant’s theory, appears for the first time in the treatise of the English philosopher Isaiah Berlin.³ Berlin considers the space guaranteed for the individual without any outside intervention as negative liberty (freedom *from something or someone*) while he views positive liberty as being the right to make decisions, in other words, the individual’s self governance (freedom *to something*). Phrased in another way, negative freedom guarantees freedom in a formal, legal sense, while positive freedom provides actual possibility to act. Hence, it creates the effective “utilisation” of formal equality. A balance must be achieved between the two freedoms. “They take advantage of the principle of negative freedom in that they provide equal freedom to both the wolf and the sheep, and the State cannot intervene even if the wolf devours the sheep,”⁴ while positive freedom can only be guaranteed to the detriment of the negative freedom of others, so it cannot overstep the right measures. To apply all this to freedom of speech, if we only guarantee the negative nature of the right, the majority of people will not have an opportunity to participate in public debate; therefore, the guarantee of certain positive rights, such as balanced, objective information by the media, which in turn only can be achieved to the detriment of the negative freedom of news producers, because they have to provide news about events which they would not otherwise publish. However, the fairness of this intervention can be justified. Partial sacrifice of positive freedom would take us back to Constant’s “ancient” liberty.

Joel Feinberg emphasises the logical connection between negative and positive liberties. We cannot be free *to something* if first we are not free *from something*: negative liberty is a precondition of positive liberty. The presence of the two, however, is together necessary for considering someone free, without any restrictions.⁵

2. The Positive Nature of the Freedom of Speech

After reviewing the arising problems, we have to examine whether freedom of speech has a positive nature; is it a task for legal regulation to promote the actual exercise of the freedom of speech? If our answer is yes, another question we have to answer

² Benjamin CONSTANT: *A régiek és a modernek szabadsága*. [The Liberty of the Ancients and the Moderns] Budapest, Atlantisz, 1997.

³ Isaiah BERLIN: A szabadság két fogalma. [Two Concepts of Liberty] In: BERLIN: *Négy esszé a szabadságról*. [Four Essays on Liberty] Budapest, Európa Kiadó, 1990. 334–443.

⁴ DÉNES, Iván Zoltán: Beavatkozástól mentes cselekvés vagy uralomtól mentes emberi állapot? (A liberális és a republikánus szabadságfogás hasonlóságai és különbségei). [Action Free from Intervention or a Human State Free from Rule? (Similarities and Differences between Liberal and Republican Liberty Concepts)] *Jogelméleti Szemle*, 2004/2.

⁵ Joel FEINBERG: *Társadalomfilozófia*. [Social Philosophy] Budapest, Osiris, 1999. 26–28.

to is how exactly this duty appears in legal regulations and to what extent it prevails. It must be emphasised that “positive nature” means much more in this context than some kind of general obligation of the State to guarantee the most basic conditions for exercising the freedom of speech (e.g. public spaces must be made available – under certain conditions – for the purposes of public meetings and demonstrations).

The most important argument of the opponents of positive liberty is that, in recognising its positive nature, freedom of speech is violated because state intervention is possible. The guarantee of positive rights necessarily results in the violation of others’ negative rights. If the State provides the opportunity for an injured party to correct false statements about him in the media, the State restricts the freedom of the editors of that media product. We always have to be cautious about state intervention, because even if the intention is right, it possibly causes more damage than provides benefits.⁶ It is indisputable that the media must act honestly, but it is not desirable if the State forces honesty on the media because, if a state authority or court intervenes with the practice of freedom, the danger of abuse or simply a bad decision is always possible.

The positive nature of freedom of speech, in other words providing a real opportunity to speak, is not necessarily the most important instrument for the expression of opinions. Although the arguments that explain the need for acknowledging the positive rights by stating that access to the media is restricted and its operational cost is immeasurable are powerful, they are however not sufficient. Legally speaking, nobody is denied the right to establish a newspaper or television station, and restricted financial resources are not the same as restricted legal rights. Accordingly, the lack of positive rights does not mean the denial of freedom of speech; however, its acknowledgement would not guarantee its proper practice. The effective practice of freedom of speech requires access but also a suitable literacy, education, and financial situation, not to mention the role of personal features (good looks, correct speech, etc.). If we accepted that a *general*, positive right exists within the concept of freedom of speech, we could just as rightfully demand the improvement of at least the previously mentioned external conditions (for example, the education received).⁷

According to one of the main arguments for the acknowledgement of positive rights, democratic decision-making and public debate would suffer if the law would not provide an opportunity to practice freedom of speech effectively. This is important, not from the speaker’s but from the listeners’, the audience’s perspective, who must be familiar with all relevant information to attain a real decision-making position.

If we primarily judge the value of speech based on its role in democracy, the pressing argument for the restriction of the media becomes dominant. Namely, the media are the only truly effective instrument that can reveal the various viewpoints to the community. This characteristic justifies their regulation and the restriction of

⁶ Frederick SCHAUER: *Freedom of speech: a philosophical enquiry*. Cambridge, Cambridge University Press, 1982. 128.

⁷ Ibid. 126.

content, to a certain extent, of the media. However, this argument is not sufficient to make the positive nature of the freedom of the press acceptable. As Alexander Meiklejohn stated, the important thing is not that everybody is allowed to speak but that everything of importance shall be said.⁸ The fulfilment of the democratic duties of the media, which is achieved through various institutions and instruments, provides the opportunity of access not to individuals but to individual standpoints (and, of course, indirectly their representatives, too). Public service obligations, mandatory news broadcasts, balance, impartiality, etc., provide, through institutional means, the possibility of public debate, and only on very limited occasions does the right to access by concrete individuals exist; for example, when correcting a press statement or providing mandatory access regarding political broadcasting during election campaigns.

According to the other main argument, providing the opportunity to speak is important because this is the only means of creating equality among citizens. According to Kenneth Karst, the basic principle of the First Amendment of the Constitution of the USA is equality, which to a certain extent is a barrier to others' freedom.⁹ Participation in forming public opinion is everybody's equal and morally based right. It cannot be the privilege only of the wealthy. That is why at least some opportunity has to be provided for everybody to comment on a given debate and the speakers' positive right must be acknowledged. Simultaneously with this, others' obligation to provide instruments and opportunities to facilitate the effective practice of freedom of speech must be recognised, too. However, obviously, this should not mean that everybody can appear on television, but it does mean, for example, that everybody has the right to protest in public or distributing flyers on the street, all this under state protection. Equal access cannot be guaranteed in the practice of freedom of speech, but the regulation of the media and the opportunity to utilise instruments, besides the media, for the expression of opinion, may provide a balance. Equality must be interpreted perhaps from the perspective of a given opinion and not that of individuals.¹⁰

According to Michel Rosenfeld, the lack of positive freedom of speech imperils democracy, because it can be interpreted as „a concentration of power and support of monopolist tendencies.”¹¹ The average citizen, observing his and others' helplessness, easily acquiesces to public affairs being decided “over his head,” without his opinion being sought.

⁸ Alexander MEIKLEJOHN: *Political freedom – the constitutional powers of the people*. New York, Oxford, Oxford University Press, 1965. 26.

⁹ Kenneth L. KARST: Equality as a central principle in the First Amendment. *University of Chicago Law Review*, 1975. 20.

¹⁰ Michel ROSENFELD: Free speech, equality and minority access to the media in the United States. In: András SAJÓ – Monroe E. PRICE (szerk.): *Rights of access to the media*. Boston, Kluwer Law International, 1996. 72–74.

¹¹ Michel ROSENFELD: Az emberi jogok és az alkotmány az Egyesült Államokban. [Human Rights and the Constitution in the United States] *Világosság*, 1990/8–9. 596.

Those advocating exclusively for the negative nature of the right forget or make the wrong judgment about the danger of private restrictions of freedom of speech. Jerome Barron calls the belief, which assumes that the free market for speech and the withdrawal of the State will create the necessary balance, the “romantic interpretation” of freedom of speech.¹² The fact that the speech will not be “audible” unless we invest huge amounts of money and the nearly exclusive monopoly of the media in influencing public opinion has altered the picture previously formed about freedom of speech. Today, if we intend to correct the inequalities of the private sphere (the free market of speech), we must turn for help to the once “feared enemy” of free speech, the State.¹³

It may be concluded from the comparison of the conflicting views that the positive nature of freedom of speech may be implemented primarily in a special situation – meaning the definition of the contents of the freedom of the press – only. Generally (meaning speeches outside of the media), the differences between the various means of exercising rights may be eliminated by indirect means (e.g. by state aid in the fields of culture, by regulating election campaign finances, etc.) only.

3. The Meaning of Freedom of the Press

On the basis of the above considerations, freedom of speech is not a *one-dimensional right*. It achieves its full potential, applying Isaiah Berlin’s differentiation, through the *simultaneous prevalence* of its positive and negative natures. Freedom of speech, however, is not the same as freedom of the press. According to the narrow interpretation of the freedom of the press, the various media (newspapers, online forums, television channels, radio stations, etc.) and the journalists and reporters of such media may elaborate their opinions on the basis of this right. By doing so, they essentially exercise the right of free speech within an institution, which is otherwise – in addition to the general right to free speech – subject to numerous other rules. The liberty right bestowed on the media is actually not a right for the individual (e.g. for journalists) but for the *institution*, even though the direct beneficiary of freedom of the press is typically the journalist, or the editor.

We have good reasons to guarantee freedom of the press, of which the most important is the interest in ensuring the proper function of democratic societal order. However, the content and meaning of freedom of the press is not usually discussed with proper weight in treatises and textbooks on the boundaries of freedom of speech, neither in Hungary nor, for example, in the United States.¹⁴ It is as if the arising problems could only be narrowed to the realm of *expressibility* (the direct

¹² Jerome A. BARRON: Access to the press – A new First Amendment right. *Harvard Law Review*, 1967. 1642–43.

¹³ Owen M. FISS: Free speech and social structure. *Iowa Law Review*, July 1986. 1405. o. and Fiss: *The irony of free speech*. Cambridge, Massachusetts, Harvard University Press, 1996.

¹⁴ Marvin AMMORI: Another worthy tradition: how the free speech curriculum ignores electronic media and distorts free speech doctrine. *Missouri Law Review*, 2005. 59.

limitations of the right), although there are many more questions to ask and answer concerning freedom of the media. The examination of the content of freedom of the press inevitably poses structural-institutional questions as well as other dilemmas regarding, for example, the restriction of free competition, protection of national culture, and the proper representation of public interest in general.

The differentiation between the positive and negative natures is a guiding principle within the concept of freedom of the press, too, and it can be interpreted with the same content as freedom of speech. The starting point is also freedom *from something* (negative), in other words, prohibition of intervention. However, in this case, we must pay attention to the *restriction* of the right *by the private sphere*, too. The freedom *to something* (positive), in turn, with regard to the freedom of the press generally does not provide rights to access that can be demanded by individuals. However, for the sake of broader access, the right may provide, to a certain extent, exceptions from the prohibition of intervention exactly for the sake of full assurance of the right to liberty.

Every analysis can only interpret the right of freedom of the press in the light of the rapid, day-by-day progress and transformation of the media. However, *globalisation*, *convergence*, and *monopolisation*, which are almost inextricably interlaced with each other, have not fully eliminated, in the process of media development, any room for state legislation and legal enforcement. Technological developments have a great ability to make us forget under their cover about the validation of the *regulatory principles*, which more or less *independent* from the characteristics of the transmitting medium, and their original rationale and meaning. It has to be stated again and again: in the regulation of the media, there are certain *constant principles* and *values*, the application and enforcement of which are of fundamental importance for the citizens of democratic and culturally unique states.

Simply stated, the sharp dividing line is between the proponents of the *free market* and *State intervention*, but numerous variations of these ideas exist in both groups. A great majority of the proponents of the free market trust in the market, not because they view the media as any other commodity for sale (such as, for example, nail polish), but because they are wary of any role the State might play in regulating the operation of the media. Possibly they completely understand the imperfections of the market and the adverse effects the logic of the market has on the media, but they are ready to pay even this price to keep the State away. Others believe, with blind faith in the market but perhaps with a great amount of cynicism, that the market is omnipotent: with rules created by and for itself, the market ensures the best possible and most effective functioning of the media, satisfying private and public interests simultaneously. Quoting Clinton Rossiter, this is nothing else but “the great train robbery of [American] intellectual history”¹⁵: today’s devoted supporters of *laissez faire*, reinterpreting but tirelessly using the arguments of 19th century early liberalism, want to preserve, in the security of unchanged guarantees against the

¹⁵ Clinton ROSSITER: *Conservatism in America*. New York, Vintage Books, 1962 (2nd ed.) 128.

State, its defined fundamental values (liberty, individualism, opportunity, progress, etc.) in the interest of protecting the already much stronger private sphere and large international corporations which overcome state interests with effortless ease. The operation of the media, which simultaneously demands several basic human rights originally belonging in the realm of private autonomy (freedom of the press, right to property, freedom to conduct a business), becomes regulated to protect the original meaning of liberty. Prevention of media monopolies, positive and negative content regulations, and actions attempting to protect culture, although they undoubtedly restrict the media's room to manoeuvre, in reality do not limit liberty: on the contrary, they serve to mend the concept of liberty which has possibly been deformed by the private sphere. The positions, which do not enthusiastically welcome but accept out of necessity State intervention as the only possible solution, view the media as a fundamental institution of national existence. It is because the media can be "used" for much more than any other service offered on the market. We could respect the press even as the network providing the primary forum for facilitating the cohesion of society, taking a key role in conducting the debates of the community, and promoting universal and national culture.

The market and the State, however, are forced to exist next to each other and tolerate one another. The first provisions (section 3, paragraph 1) of the British media law, the *Communications Act 2003*, which defines the *simultaneous* furthering of the interests of *citizens* and *consumers* as a general duty of the communications authority, are perfect reflections of this reluctant duality. Needless to say, the two interests are often in conflict. However, the media must respect both. The consumer is interested in technological improvement, low prices, and a wide selection of entertaining shows, while the citizen is interested in proper access to information, satisfaction of their cultural needs, and the opportunity to participate in public debates. Of course, the description of these two different approaches is significantly simplified, because in reality these needs, although in different proportions, are combined in the members of the media audience, as most of them are consumers and proud citizens at the same time.

With some cynicism, the new prototype of the ideal human being, which started to develop in the second half of the 20th century and has achieved its full form by today, is *homo consumer*. Resulting from the unchallengeable logic of the economic system chosen by the states of western civilization, the ideal of the modern era is the increasingly intensive consumption of material goods. The appearance and overwhelming numerical superiority of homo consumer, it seems, ended the posthumous competition of George Orwell and Aldous Huxley.¹⁶ The two English clairvoyants of the first half of the 20th century described two perfectly contradictory *dystopias*. Orwell's *1984*, which was still banned on this side of the Iron Curtain in the 80s of the last century, is the shocking illustration of totalitarian regimes, where tyrannical authority prevails using dictatorial measures. Huxley's *Brave New World*,

¹⁶ George ORWELL: *1984*. Budapest, Európa Kiadó, 1989.; Aldous HUXLEY: *Szép új világ*. [Brave New World] Budapest: Kozmosz Könyvek, 1982.

on the other hand, erects a model more relevant at least in this part of the world because, in the new world, the oppressive dictatorship does not work. Maintenance of authority is achieved by the satisfaction of the carefully regulated individual needs of the subjects. Unfortunately, we cannot assert that some of the elements of the dark future described in the novel could not be paralleled with events of the more than seven decades that have passed since its publication. Some authors go as far as identifying the effects of modern media on individuals with the effects of the mood enhancing drug, *soma*.¹⁷ Although, if there is some rhetorical overstatement, Huxley himself admitted his prophetic abilities in a later essay, in which he describes his worries concerning the effect mechanisms of modern media.¹⁸

The greatest mistake of the theory preferring the market is the way it approaches the question of *individualism*. These views respect individual autonomy (both in relation to the freedom to run a business and freedom of the press), as a primary value, which position, of course, is acceptable. However, autonomy can be interpreted from two opposite directions, from the perspective of the media and of its audience. The supporters of the market argue that the lack of state restrictions helps both to the same extent: the media are not bound by an outside authority, and the audience can choose from an unrestricted supply. This is the first flaw in the argument, as modern mass media, which in general aim at the simplest and quickest profit-making, without hesitation throwing aside its fulfilment of the duties indispensable to the functioning of democracy, subordinates its broadcast time primarily to the entertainment of the largest possible masses, in the holy name of individualism, thus contributing to the development of the no-personality *mass human being*. Ortega y Gasset has painted a long time ago in his classic essay, *The Revolt of the Masses*, the process of the rise to power of the mass human being (who can be identified without further ado with our homo consumer above).¹⁹

Of course the dead end of unrestricted individualism was recognised long before Ortega. Free market capitalism produced serious societal injustices early on. First, since the beginning of the 20th century, classical private law began to go through significant transformations. This development is called the *publicization* or *constitutionalisation of private law*²⁰ and it resulted in the loosening of fundamental private law principles and structures for the sake of the more effective protection of the living conditions of the personality and the individual. What seemed before the only real token for the autonomy of the personality, i.e., the enhanced protection of private property and the private sphere, because of the cruel logic of the market and only a little over a century after the codification of these rights began, questioned

¹⁷ Ronald K. L. COLLINS – David M. SKOVER: The First Amendment in an age of paratroopers. *Texas Law Review*, May 1990. 1084.

¹⁸ Aldous HUXLEY: *Visszatérés a szép új világhoz*. [Brave New World Revisited] Budapest, Dee-Sign, 2000.

¹⁹ Ortega y Gasset: A tömegek lázadása. [The Revolt of the Masses] Budapest, Nagyvilág, 2003.

²⁰ LÁBADY, Tamás: *A magyar magánjog (polgári jog) általános része*. [The General Part of Hungarian Private Law (Civil Law)] Pécs – Budapest: Dialóg Campus, 1997. 22–27.

the basic conditions for the existence of the weaker individual who did not have any property. To prevent vulnerability, *human rights*, especially *human dignity* of the individual, who was *defined as a property owner* before, came to the forefront.²¹ This process received another push after World War II. However, it soon became apparent that limitless application of human rights (including freedom of the press) could be also used to take advantage of the status of the weaker. Hence, the freedom of the few must be controlled for the sake of the freedom of the masses. Many recognised this, and came to the only possible conclusion that steered the future development of private and human rights from individualism to some sort of a community principle-based theory. At the beginning of the 20th century, the British legal scholar Albert Dicey treated this transformation as evident, reporting in his book about the change of principles affecting the thinking of British public opinion. According to his assertions, from the beginning of the 19th century, a sort of *collectivist view*²², which, of course, also influenced the thinking concerning the role of the press, started to replace *Bentham's individualism*. This notion is very significant in the “cradle” of individualism, which, according to certain authors, was already market-oriented in the 13th century, and was built for centuries on the sanctity of private property and the strength of the individual²³, in the spirit of *Puritan traditions*, measuring the value of a person according to his commercial success.

During the historical development, of course, the *negative nature* of the freedom of the press was emphasised, which right then was identified with the prohibition of *censorship*. This coincides with the thinking that the ban of “prior scrutiny” will lead to the total freedom of the press. This view required re-evaluation after the adoption of the first laws eliminating censorship, because external interference with the freedom of the press has a wide range of possibilities besides the limitation of publication. To prevent providing information for the community from becoming the monopoly of a few, the law limits the ownership right of broadcasters and newspapers and the possibility of cross ownership, defining a limit over which the same owner cannot obtain further rights. The maintenance of state funding of public service media further limits free competition. Naturally, these rules also indirectly affect the content channelled through by the media.

However, the various *programming structure requirements* imposed on radio and television media service providers have direct effects on the content of the media. Part of these set negative requirements (advertisement limitations, protection of minors, limitation of erotic content), others demand explicitly positive, proactive behaviour from the producers of broadcasts (balanced news reporting, broadcasting of public service programming, etc.).

²¹ On this process cf. SÓLYOM, László: *A személyiségi jogok elmélete*. [The Theory of Personal Rights] Budapest, Közgazdasági és Jogi Könyvkiadó, 1983.

²² Albert Venn DICEY: *Lectures on the relation between law and public opinion in England during the Nineteenth Century*. London, MacMillan, 1919.

²³ Alan MACFARLANE: *Az angol individualizmus eredete*. [The Origins of English Individualism] Budapest, Századvég – Hajnal István Kör, 1993.

Interference with the freedom of the media can originate not only from outside but also from *inside*. This phenomenon stems from the business nature of the media. It is a fundamental truth that the media, which are expensive ventures, are sponsored not by the readers but the advertisers. It can be logically inferred that, approaching from the business nature of the enterprise, the “products” offered for sale are not the news articles and programmes produced by the media. If that were the case, the media, at least in their current form and extent, would not be capable of supporting themselves. In reality, the “products” offered are the *viewers, listeners, and readers*, in that the larger their numbers, the higher the advertising fees are in exchange. That is why a popular product, newspaper, and programme have to be offered as a *bait* to attract more and more customers and turn them into the consumers of the media, and with that, of the commercials. The advertisers, who, because of the high prices in the case of the most important media, can only be really large companies, become the number one controllers of the whole process, even if their effect remains indirect. And in the market, where a lot of money is risked, rock hard rules prevail: advertisers prefer to see their commercials in a media environment deemed appropriate, possibly in the neighbourhood of programmes that are popular, controversy free, entertaining, radiate a peaceful and quiet atmosphere, or, without any real stake, generate excitement and suspense. Talk shows, television series, game shows, magazine programmes, and action movies are perfect for this goal. Programmes dissecting real societal problems, fact finding, more sophisticated cultural programmes, or other programmes that interest only a smaller portion of social groups with significant purchasing power are less suitable for this kind of advertising.²⁴ The result is nearly total *homogeneity* of the selection of competing streams of programming, in which almost no significant differences can be detected (because of the risk of losing consumers). Free competition, making possible the operation of many competing media, increases only the *quantity* but not the *selection*.

The competition for consumers is increasingly intensifying, and the converging media more and more interweave with everyday life, while community debate and social “*discourse*” slowly disappear.²⁵ Advertisers categorise their potential customers (the target group) based on their financial status (purchasing power), persuadability, and other such characteristics that hardly fit in the democratic principle of “one man – one vote.”²⁶ Internal “*private censorship*” that subordinates everything to the maximisation of profits, which can stem from the personal interests or even political convictions of the owners or employees of the media, however, is not the same as external censorship. In the case of the former, we cannot talk about tyranny, or even justifiable external intervention closely regulated with legislative guarantees.

²⁴ Robert W. McCHESNEY – Ben SCOTT (eds.): *Our unfree press – 100 years of radical media criticism*. New York, New Press, 2004. 119–176.; EDWIN C. BAKER: *Advertising and a democratic press*. Princeton University Press, 1994.

²⁵ Ronald K. L. COLLINS – David M. SKOVER: *The death of discourse*. Carolina Academic Publishers, 2005.

²⁶ FISS, *supra* note 12., 54.

Anyway, censorship in constitutional states has already long disappeared. However, its new form, private censorship, which is indirectly imposed by interest groups commissioning the advertisements, achieves similar results as its once existing “step-brother”, realised exclusively through external forces: it makes difficult and even impossible for the media to perform their public service obligations.

The *positive nature* of freedom of the press is inseparably interwoven with the concept of *social publicity*. Although the theory is primarily connected to the name of Jürgen Habermas²⁷ and, during the decades since its publication (1962), representatives of various social sciences dissected its details in numerous occasions, from our perspective its main principles can be accepted without any major arguments. The central nucleus of the train of thought concentrates around the conceptual construction of “*public opinion*,” which has existed in practice since the 18th century.²⁸ According to the theory, the elements of “publicity” (from coffee houses to newspapers) jointly contributed to the development of *public thinking* and *critical outlook*, and the slow and gradual start of the process of *democratisation*. Publicity ensured access to information, and, with time, it grew so significant that it became capable of restricting the State. An important element of the concept is the provision of a wide range of opportunities to access, with the help of a near equal opportunity of participation ensured by low costs of entry.²⁹ According to Habermas, the 20th century development of mass media, though in principle contained the possibility of the broadening of publicity with great magnitude as compared with the earlier state of affairs, in practice destroyed the earlier, well-functioning model of public sphere. The mass media monopolised the forums of public opinion and, among the topics of the media, defined and *dictated* by logic of the market, the proper representation of mutual and joint interests is no longer a defining factor. This final conclusion of the book can be accepted regardless of the truth of Habermas’ other theses.

The category of public opinion is important for us, because the only acceptable social structure, democracy, can only work exclusively through public opinion. If the affairs of the “public” are not debated in the various institutions of publicity, if citizens do not connect with each other at various forums, if these forums do not provide the minimal cohesion necessary between the members of society, then, although it is possible that the laws are promulgated by parliament based on public representation, the community no longer exists in a democratic order.

Pericles’ famous Funeral Oration³⁰ directly *stigmatises* men indifferent to public life. Reference to ancient Athens is appropriate at this point. It is because the wide

²⁷ Jürgen HABERMAS: *A társadalmi nyilvánosság szerkezetváltozása*. [*The Structural Transformation of the Public Sphere*] Budapest, Osiris, 1999 (3rd ed.).

²⁸ Asa BRIGGS – Peter BURKE: *A média társadalomtörténete – Gutenbergtől az internetig*. [*A Social History of the Media: From Gutenberg to the Internet*] Budapest, Napvilág, 2004. 74.

²⁹ Monroe E. PRICE: *A televízió, a nyilvános szféra és a nemzeti identitás*. [*Television, the Public Sphere and National Identity*] Budapest: Magvető, 1998. 54.

³⁰ THUCYDIDES: *A peloponnészoszi háború*. [*History of the Peloponnesian War*] Budapest, Osiris, 1999. 134–43.

spread of the media and the increase of its effects and influence generated the naïve belief, according to which the direct exercise of power, or at least something similar to it, of the Greek *polises* may be recreated with the instruments of modern media. The media would provide an opportunity to conduct citizens' debates, through the naturally necessary mechanisms of representations, because everybody cannot speak, and some inevitably have to represent others.³¹ Although not the same as the Athenian *agora*, the media is such a public forum that is the only effective venue and functioning means of the expression of various viewpoints.³² Quoting the forceful expression of Owen Fiss, this would be the media's "*democratic mission*."³³

The most authoritative (and consequently most attacked) American devotee besides Owen Fiss of necessary state intervention in the field of freedom of the press is Chicago professor Cass Sunstein. His work, summarising the modern age problems of freedom of speech, is a *legal complaint* written against the free marketplace of ideas.³⁴ In his book, Sunstein unequivocally demands a second *New Deal* because, according to his discoveries, modern media not only fail to extend a helping hand to it, but also makes the functioning of democracy impossible. The main conclusions of the book focusing on the United States should be taken into account in Europe, too. The primary concerns weighing heavily on the author's mind are not novelties. With the full expansion of commercial media, the hope of training active citizens to gain decisive roles in participatory democracies proportionately decreases. According to the professor, the United States should give up the stubborn resistance that prevents state intervention, because strictly keeping the distance only makes the status quo, the increasingly growing media empire, even more powerful. In certain instances, buttressed by strict guarantees, the State is indeed capable of promoting liberty. To borrow the metaphor of the market, representative democracy is based on representation by citizens selected by, and from among, themselves from time to time (in Hungary every four years) to conduct ongoing business and make decisions. During the elections taking place every four years, citizens naturally generally have less information compared to those elected. The political elite always will be significantly more informed than other members of society. The media, should, to the best of its abilities, balance this information deficiency, as the decision of the citizens is irrevocable and irreversible. However, the current system is unsuitable for publishing the available views and information, because the discussion of public affairs is not in the interest of the majority of the media; what is more, it would be explicitly burdensome.

Therefore, based on the foregoing, *ideas* – in a philosophical sense – are entitled to access, but such a conclusion is quite hard to be reflected in legal regulations. However, regulation has found the means that may – even if not eliminate, but

³¹ John KEANE: *Média és demokrácia*. [Media and Democracy] Budapest, Helikon, 1999. 155., 38–39.

³² Charles W. LOGAN: Getting beyond scarcity: a new paradigm for assessing the constitutionality of broadcast regulation. *California Law Review*, December 1997.

³³ Fiss, *supra* note 12., 50.

³⁴ Cass R. SUNSTEIN: *Democracy and the problem of free speech*. New York, Free Press, 1995 (2nd ed.).

at least – reduce the differences between the chances of conveying certain ideas to the public. As such, in legal terms, the *entirety of the audience* of the media is entitled (relying on concrete regulatory provisions) to demand proper and balanced information and access to differing ideas. Of course, not even lawyers can think that this form of direct access, the composition of the list of ideas to be published, and balance portioned on a pharmacy scales, is free from all serious difficulties. On the contrary, the task is very sensitive and requires able journalists and editors. Obviously, not *every* idea deserves publicity. The definition of a rational framework is indispensable. The perspective for differentiation could be, for example, the societal proportion of citizens representing the given viewpoint, and the respect for legal regulations and moral principles. While the rules defining the limitations (e.g. hate speech, personal rights, protection of children) to the freedom of speech and the freedom of the press are relevant to such decisions, they in themselves do not determine all the relevant aspects of the necessary selection of ideas; the positive nature may not be fully implemented without the appropriate attitude on the side of journalists, editors, and media owners.

However, the rule of balanced information – widely applied in Europe – is just one of the rules resulting in access. Among other, the followings should be mentioned as well: the right to respond (right to correction), the operation of the public service media system – one of the main tasks of which is to correct the imperfect operation of the market of ideas –, the restriction of ownership concentration on the media market, or the *must carry* obligations of broadcasters. These rules may be called comprehensively the rules facilitating media pluralism and so recognition of the positive nature of press freedom fundamentally serves the purposes of media pluralism.

Nobody demands total impartiality from the media. A wide space is available for biased publications and programmes. This, however, has to be separated from the task of supplying information. Although the proposal is tendentiously naïve, in reality, nothing else would be necessary but that the media respect the ethical rules created for themselves. Of course, our age does not favour codes of ethics, as other interests overrule them. Equality enforced by legal means can never be full and cannot be desirable either, because viewpoints represented by more people perhaps deserves more exposure. The goal to be set is the *pluralism of opinions* and not equality.³⁵

Many arguments can be brought up against the acknowledgement of the positive nature of freedom of the press. According to one of the groups of arguments, all kinds of state interventions rest on inherently false foundations, because if we are serious about democracy, a fundamental right of such importance and, at the same time, of symbolic value cannot be limited by the decision of a small circle of people (be it even parliament). Calling a spade a spade, it is more desirable that the audience decides what it wants from the media than, regarding its numbers, a proportionately narrow social stratum. The preferences of the audience can be measured relatively precisely.

³⁵ Giovanni SARTORI: *Demokrácia*. [Democracy] Budapest, Osiris, 1999. 60–61.

The audience will signal in a noticeable manner if it wants more programmes of political debate or perhaps broader information. If the public wants entertainment, its decision must be accepted instead of despising it, as Pericles did, for its indifference to public affairs. Anyway, public interest in relation to the media has not been precisely defined³⁶, and it is not more than an oft referenced but never defined rhetorical catch. It is only a presumption that the free flow of information, debate of public affairs, and pluralism of the media serve the public interest.

As Rupert Murdoch, the powerful owner of News Corporation, says, let freedom and choice replace regulation and scarcity.³⁷ The media is just a commodity, like anything else³⁸, as for example, according to Mark Fowler, “[t]he television is just another appliance – it’s a toaster with pictures,” and if a toaster does not make a perfect toast, nobody will buy it. Based on this analogy, the content of the media can only be influenced by the direction of market competition.

Without a doubt, the market has certain advantages that the State cannot provide with its own instruments. Competition can eliminate the incompetent, increase quality, and promote development. It makes performance measurable. Sometimes the market is forced to make concessions to satisfy minority needs, too. The argument supporting freedom of the market has a very bogus point. It looks at the figures, examines what the majority selects from the available choices, and concludes that the audience demands exactly what the media, through the selected programme, presently provides. In its simplicity, this seemingly effective argument loses its edge if we recognise that, in the market filled by the modern mass media, the audience does not have a real opportunity to choose. The audience can only choose from among the products that are offered. They perhaps do not even know what other possible choices and programmes the media could offer besides the ones they already know. The media by itself is not capable of providing colourful programming, at least not in a reachable manner for the masses. The large majority of society receives information primarily from television, in Hungary and Europe namely from terrestrial broadcasting channels, of which so far altogether three are available in Hungary. The other weakness of the argument is that it pretends as if the media merely *catered* to the needs of the audience, although, it just as much *shapes*, or, with a stronger expression, *dictates* public taste.

Others argue against the acknowledgement of the positive nature with the *fetishization* of the market but claim that everything is better than state intervention. According to this view, the State must retreat to the smallest possible area and should only undertake the most important tasks (law enforcement, guarantee of substantive

³⁶ Everette E. DENNIS,; The press and the public interest: a definitional dilemma. In: E. E. DENNIS – A. H. ISMACH – D. M. GILLMOR (eds.): *Enduring issues in mass communication*. St. Paul, Minnesota, West Publishing, 1978.

³⁷ KEANE, *supra* note 33., 45.

³⁸ Daniel L. BRENNER – Mark S. FOWLER: A marketplace approach to broadcast regulation. *Texas Law Review*, 1981.

rights, etc.).³⁹ They do not deny the appropriateness of the intentions of people urging regulation, as the proponents of the “night watch state” also would like it if the media fulfilled its information distribution function respecting ethical norms, but the enforcement of this should not be entrusted to the State, because that would necessarily distort the execution of the originally noble intention.⁴⁰

According to this, the State is a constant source of danger to individual liberty, and its limitation is a basic requirement of democratic order. Well, the proponents of state intervention argue for the State to play a role, not because of some sort of totalitarian devotion but because they sensed the restricting effect of the private sphere. Today the State has a rather narrow margin for action; a series of constitutional safeguards guarantee the rights of the individual. However, no similar guarantees would be available against the media operating in the private sphere. The media’s obligatory function stands in the centre. If somebody disrupts that function, it is essential to stand up against it.

Robert Post argues that the views demanding accountability from the media for democratic principles are self-contradictory. That is to say, democracy, at least if we try to fill it with actual content, assumes free, autonomous, and independently thinking and decision-making individuals. Hence, *democracy* and *individualism* do not contradict each other (as we have already asserted it in connection with the theories justifying freedom of speech). If, in the name of democracy, we limit the individual’s (media owner and journalist) margin for action and, simultaneously with this, in a *paternalistic* manner facilitate that the “ideal democrat” (as we imagined), appropriately receives information, we contradict the principles of this very democrat, because this way we limit the strengthening of individual autonomy.⁴¹ Accepting its content of truth, the force of the argument is significantly weakened by the fact that, in practice, the liberty of mass media can only create the *false illusion of individualism*. Lack of information, our “democrat,” raised with the assistance of the media, under the spell of endless entertainment, is in reality incapable of making autonomous decisions. The market by itself does not advance the perfection of his personality.

It has to be asserted as a note of general validity that the indirect existence of access to less popular channels accessible only to limited circles is not sufficient for “ticking off” the democratic duties of the media. We have to take reality into account. Adequate catering to public interest must be assured through forums that are accessible (both in a technological and a financial sense) to the majority of society, where in practice “majority” ought to mean the entirety of society. Currently, this forum primarily means national television. If the majority receives information from there, the appropriate flow of information must be provided through that channel.

³⁹ Robert NOZICK: *Anarchy, state and utopia*. New York, Basic, 1974.

⁴⁰ SCHAUER, *supra* note 5., 128.

⁴¹ POST, Robert C.: Meiklejohn’s mistake: individual autonomy and the reform of public discourse. *University of Colorado Law Review*, Fall 1993. 1109. and POST: Equality and autonomy in First Amendment jurisprudence. *Michigan Law Review*, May 1997. 1517.

4. Media and Culture

Beyond the system of relationships between the media and democracy, the other fundamental group of issues in the focal point of debates in the determination of the content of media focuses on the relationship between the *media* and *culture*. Again, the issue is so complicated that it is not sufficient to rely only on the solutions proposed by lawyers, though they can surely define some of the *cornerstones*. The starting point is the assertion that the media and culture have a complicated and controversial relationship. The modern mass media are capable of delivering cultural products to a much wider audience than before, thus ensuring their preservation and further development. At the same time, because of their unique nature and the logic of the market, which has been condemned many times, the “mainstream” media do not view the broadcast and introduction of higher cultural products as its responsibility. What is more, the media not only channel the content, characteristically aiming at mere entertainment, as demanded by the masses, but they also create and form the new “cultural” environment.

Mass media have significantly reformed the means of access to culture and influenced its general quality. Today, the general level of culture is determined not by a narrow elite but by the standards of average citizens. This was the price of becoming multitudinous. The next dimension of becoming multitudinous is the development, which began two-three decades ago with its emergence, of *global media*. The spreading of multinational media enterprises, the demolition of the Iron Curtain, and the global marketing of American cultural products resulted in the first sprouts of shared, supranational, global culture. Simultaneously with, and as a response to, this tendency, certain initiatives soon emerged for the preservation of individual national cultures. According to the most horrific scenario, the global media industry in the long run will result in the total destruction of national cultures. Perhaps this script envisions dangers, because the preservation of national cultures is not only the role of the media, and the global media market could even assist in sustaining national cultures (for example, with the help of Internet publication of previously hard to access content; let us not forget that the Internet, making national cultures available with the press of a button and free of charge, is itself the product of the global media industry). The new universal culture can actively contribute to a supranational, common identity; of course, on what kind of elements this new identity is built is important. Namely, the appearance of American “cultural imperialism”⁴² in certain television programmes, movies, and musical pieces, which are characteristically not among the products of “high culture.” Regarding their financial means, creators of the products of national culture are unable to compete with the makers of products for the global market. Therefore, other *protectionist* measures are necessary. The State has important functions in the preservation of national culture. At least thus far, nobody was brave enough to openly dispute this. The European approach to the

⁴² BRIGGS—BURKE, *supra* note 30., 248.

protection of national culture accepts state intervention as a definitely valid reason. Regarding the manner of intervention, however, a certain level of uncertainty can be sensed, and not without reason. To protect national culture, the State would have to go into battle with company giants reigning over the media market of the world, while at the same time states are bound, on one hand, by international treaties and their monitoring bodies, and on the other, regulations of the internal market dictated by European integration. It is worthy, however, to return to the cradle or, yet even, the conception of European unity. Jean Monnet, one of the fathers of integration, stated that if we could start it all over, we should begin with culture.⁴³ The idea, according to which Europe is primarily a *spiritual and cultural unity*, originally counted as the intellectual foundation of the entire integration effort. Therefore, based on the original intentions, the European integration process should have assisted in the preservation of national cultures and, at the same time, defined the elements of European culture existing according to popular belief and resting on an integrated foundation (Robert Schuman's essay, *For Europe*, is built on this idea. Even the title of one of his chapters is telling: Europe "before becoming a military alliance or an economic entity, must be a cultural community in the highest sense of the term."⁴⁴) In practice, this has not happened in the more than half a century that has passed since its beginning. The Audiovisual Media Services Directive, beyond defining general minimal content requirements, basically upholds the right of Member States to control audiovisual content, primarily through certain limitations of the market, and tries to protect national and European identity. Union law, for example, allows the existence of public service media service providers, although their state financing is contrary to the requirements of free market competition. Further, the Directive requires that television-programming services must broadcast European works in more than fifty percent of their content. The weak point of the regulation is that it tries to protect cultural identity based exclusively on formal criteria (practically, a public service broadcaster is what is called that way, and European work is something that was created by a company with its head office in a Member State), and it does not introduce content regulation. As such, the end result does not achieve the desired objective: a great portion of public service broadcasters do not significantly differ from commercial ones and practically anybody can produce a European work, not to mention that there is no remedy against the actual phenomenon that, for example, an European work can follow American patterns and contain no elements of European culture at all.

5. Conclusion

How can the concept of freedom of the press be ultimately defined? Would A.J. Liebling be right, whose *bon mot* quoted a number of times states "freedom of the

⁴³ Quoted by Richard COLLINS: *Media and identity in contemporary Europe: consequences of global convergence*. Exeter, Intellect, 2002. 25.

⁴⁴ Robert SCHUMAN: *Európáért*. [For Europe] Pécs, Pannónia Könyvek, 1991.

press is guaranteed only to those who own one.⁴⁵ No, he is not right at all. The right to the freedom of the press is a complex right, encumbered with the need to reconcile rather diverse interests, and, in the course of exercising this right, its external limits, as well as the content thereof and the resulting obligations, should be taken into consideration.

The following ideas might also be worth some consideration. Some argue that the Internet has fundamentally changed social communication and has overturned the traditional and easily identifiable – and able to be regulated – means of public communication. Social publicity has moved to the realm of the online world. As such, regulation of traditional media and the legal recognition of the positive nature of the freedom of the press became pointless, as it makes no sense to regulate media that are being marginalised anyway while the free world wide web is blossoming. While the Internet obviously contributes to the free movement of ideas and to the democratisation of publicity, its technical features (unlimited expansion, anonymity, possible emergence of dependence) also contribute to the spread of infringement and inequality, and generate further problems.⁴⁶

The functioning of the online marketplace of ideas is also imperfect. There is close competition for the grace of consumers, even on the Internet. In this competition, the arguments for an unregulated Internet and the objective to reserve it as an “uncorrupted reservoir of democracy” become irrelevant. Actors with more financial means have enormous advantages, even in cyberspace.⁴⁷ The most frequently visited websites are owned by corporations, which are also powerful market actors in real space.⁴⁸ These conglomerates and media empires attempt to form the world wide web to their likeness; while these attempts may remain fruitless due to the very nature of this specific medium, they may succeed in limiting the browsing habits of large parts of society to the content provided by them, while banishing ideas that do not fit in.

However, the disagreement between the proponents of free market and state intervention seems to be irreconcilable, and so constant efforts are required to have the positive nature of press freedom recognised and accepted. Of course, it is true that no change could be a pressing interest for those who have an interest in maintaining the *status quo*, the current situation.⁴⁹ However, “press freedom cannot be absolute without contradicting the ethical basis for its existence”.⁵⁰

⁴⁵ A. J. LIEBLING: *The press*. New York, Pantheon Books, 1981 (3rd ed.).

⁴⁶ Perry KELLER: *European and International Media Law. Liberal Democracy, Trade and the New Media* Oxford, Oxford University Press 2011. 21–27.

⁴⁷ Seth F. KREIMER: „Technologies of Protest: Insurgent Social Movements and the First Amendment in the Era of the Internet.” *University of Pennsylvania Law Review* 2001, 119.

⁴⁸ Andrew CHIN: „Making the World Wide Web Safe for Democracy” *Hastings Communication and Entertainment Law Journal* 1997, 322–325. és 328–329.; James CURRAN – Jean SEATON: *Power without Responsibility*. (London -- New York: Routledge ‘2003) 248–250 és 281–282.

⁴⁹ FREDERICK SCHAUER: The political incidence of the free speech principle. *Colorado Law Review*, Fall 1993. 949.

⁵⁰ JOHN LAWS: The limitations of human rights. *Public Law*, 1998. 265.